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UNITED STATES SUPREME COURT REVIEW OF TENTH CIRCUIT DECISIONS

I. *ALLIED CHEMICAL CORP. V. DAIFLON, INC.*—REVERSED

In *Allied Chemical Corp. v. Daiflon, Inc.*,[1] the Supreme Court, in a *per curiam* opinion, reversed the Tenth Circuit Court of Appeals' order granting a writ of mandamus in *Daiflon, Inc. v. Bohanon*.[2] The Court held that an erroneous interlocutory order involving the exercise of a district court's discretion, such as the improper granting of a new trial, will rarely, if ever, justify the issuance of a writ of mandamus.[3]

The case arose out of an antitrust action in the District Court for the Western District of Oklahoma.[4] The plaintiff, Daiflon, is a small importer of refrigerant gas who brought an antitrust suit against all domestic manufacturers of the gas.[5] After a four-week trial, the jury returned a verdict for Daiflon, awarding it $2.5 million in damages.[6] The trial court then granted the defendants' motion for a new trial.[7] In its rendition of the facts, the Supreme Court emphasized the trial court's ostensible reason for ordering a new trial: that it had erred during the course of the trial in certain evidentiary rulings.[8]

The Tenth Circuit, however, had refused to accept that the trial judge actually based his judgment on evidentiary rulings, pointing out that the trial court never specifically identified which exhibits were erroneously admitted.[9] The court of appeals found that, since the trial judge had refused to enter the defendant's motion for a directed verdict and had indicated his belief that liability had been established, his granting of a new trial on the issue of liability lacked a rational basis.[10] His real reason for granting a new trial, according to the court of appeals, was his shock at the amount of damages awarded by the verdict.[11] Thus, his decision to grant a new trial on the issue of liability invaded the province of the jury and denied Daiflon its seventh amendment right to a jury trial.[12]

But even if the trial court's decision to grant a new trial was wrong, the question remained whether the court of appeals should have invoked the extraordinary remedy of mandamus, or whether it should have allowed the

1. 449 U.S. 33 (1980).
2. 612 F.2d 1249 (10th Cir. 1979).
3. 449 U.S. at 36.
4. Id.
5. *Id.* at 33.
6. *Id.*
7. *Id.*
8. *Id.*
9. 612 F.2d at 1259. In an implied rejoinder to this point, the Supreme Court stated: "A trial judge is not required to enter supporting findings of facts and conclusions of law when granting a new trial motion." 449 U.S. at 36 n.3; *see* FED. R. CIV. P. 52(a).
10. 612 F.2d at 1259.
11. *Id.*
12. *Id.* at 1260.

new trial to proceed to final judgment, and then examine the issue of the granting of a new trial upon a regular appeal. It was on this question that the court of appeals and the Supreme Court disagreed.

In support of its issuance of mandamus, the Tenth Circuit relied on authority that "in exceptional cases involving a clear abuse of discretion or usurpation of judicial power," the remedy of mandamus is appropriate.[13] The court recognized that the Supreme Court had recently held in *Will v. Calvert Life Insurance Co.*[14] that plain abuse of discretion would not justify interlocutory review by mandamus, but found that the trial court in this case had transcended plain abuse of discretion.[15] The court also discussed the use of mandamus as a means of supervision, implying that it meant to employ mandamus in this case to rein in a wayward trial court.[16]

The court of appeals noted three federal cases in which mandamus had been used to reverse an order granting a new trial.[17] However, the court's use of the reasoning of these cases was not persuasive, as each is distinguishable from *Daiflon*; in these cases mandamus issued because of some specific violation of the Federal Rules of Civil Procedure in the trial court's granting a new trial.[18]

The classic statement of the appropriate grounds for the use of mandamus is in *Roche v. Evaporated Milk Association*:[19] mandamus shall issue only "to confine an inferior court to a lawful exercise of its prescribed jurisdiction or to compel it to exercise its authority when it is its duty to do so."[20] Citing *Roche*, Chief Justice Warren, in *Will v. United States*,[21] commented that courts had never confined themselves to a technical meaning of "jurisdiction" in interpreting the *Roche* standard, but that it was a "semantic fallacy" to argue that a district court judge lacked the power to enter an order that was merely erroneous.

Thus, the question in the *Daiflon* case was whether the trial judge's behavior was outside his power. The Supreme Court held that it was not. Referring to a case in which it had held that, for mandamus to issue, a litigant's right to mandamus must be "clear and indisputable,"[22] the Court stated: "the authority to grant a new trial, moreover, is confided almost entirely to the exercise of discretion on the part of the trial court. Where a matter is committed to discretion, it cannot be said that a litigant's right to a particular result is 'clear and indisputable.' "[23]

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13. *Id.* at 1254 (citing Bankers Life & Casualty Co. v. Holland, 349 U.S. 379 (1953)).
14. 437 U.S. 655 (1978).
15. 612 F.2d at 1255.
16. 612 F.2d at 1254.
17. *Id.* at 1257. The three cases are Peterman v. Chicago, Rock Island & Pac. R.R. Co., 493 F.2d 88 (8th Cir.), *cert. denied* 417 U.S. 947 (1974); Grace Lines, Inc. v. Motley, 439 F.2d 1028 (2d Cir. 1971); Kanatser v. Chrysler Corp., 199 F.2d 610 (10th Cir. 1952), *cert. denied* 344 U.S. 921 (1953).
18. 612 F.2d at 1257.
19. 319 U.S. 21 (1943).
20. *Id.* at 26.
21. 389 U.S. 90, 103-04 (1967).
22. United States v. Duell, 172 U.S. 576, 582 (1899).
23. 449 U.S. at 36.

Following the traditional analysis, as exemplified by *Roche* and *Will v. United States*, the Supreme Court seemed to be saying that "clear abuse of discretion" is not the correct standard for determining whether mandamus should issue. Rather, the proponent of mandamus must show an abuse of indiscretion: in other words, an order by a trial judge which he had no discretion to enter. In the case of this kind of order—for example, a trial court's violation of the Federal Rules of Civil Procedure in granting a new trial—it could be argued that the trial court was acting outside its power, and thus the traditional standard would be satisfied.

In addition, the Supreme Court emphasized that mandamus in this case violated the strong Congressional policy opposing "piecemeal review," and stated that Daiflon had an adequate means of relief through the normal appellate process.[24] The Court thus implied that the inconvenience to Daiflon of a new trial, without more, would not constitute a harm great enough to justify circumvention of the normal appellate process.[25]

Justices Blackmun and White dissented from the *per curiam* opinion, expressing dissatisfaction with the majority's peremptory handling of the case.[26]

The *Daiflon* case is part of the Court's general trend toward restricting opportunities for interlocutory review.[27] The court is apparently proceeding from the premise that piecemeal review wastes judicial resources. Though the Court's decision in *Daiflon* was correct under traditional mandamus analysis, perhaps it should more closely examine whether, in this kind of case, judicial resources can better be conserved by allowing interlocutory review to avoid the repetition of lengthy jury trials in complex cases.

Neal Richardson

II. *COMMUNITY COMMUNICATIONS CO. V. CITY OF BOULDER*—REVERSED

In *Community Communications Co. v. City of Boulder*,[28] the United States Supreme Court reversed a Tenth Circuit decision[29] in which the court of appeals had declared that the City of Boulder was immune from antitrust liability under the Sherman Act.[30]

In 1964, the Boulder City Council granted Community Communication Company's (CCC) predecessor a twenty-year, revocable, nonexclusive permit to operate a cable television business in the city. The permit was

24. *Id.*
25. *Cf.* 612 F.2d at 1254.
26. 449 U.S. at 37.
27. *See* Coopers & Lybrand v. Livesay, 437 U.S. 463 (1978), restricting the application of the "death knell" doctrine.
28. 50 U.S.L.W. 4144 (1982). Justice Brennan wrote the majority opinion, joined by Justices Marshall, Blackmun, Powell and Stevens. Justice Stevens filed a special concurrence, and Justice Rehnquist dissented, joined by Chief Justice Burger and Justice O'Connor. Justice White did not participate.
29. Community Communications Co. v. City of Boulder, 630 F.2d 704 (10th Cir. 1980).
30. 15 U.S.C. § 1 (1976).

assigned to CCC in 1966. Since then CCC has provided cable television service to the University Hill area of the city, an area where approximately twenty percent of the city's residents live and where for geographic reasons broadcast television signals cannot be received well. Because of limited technology, CCC's service was restricted to the retransmission of Denver and Cheyenne broadcasts. When improved technology enabled CCC to offer substantially more entertainment than could be provided by local broadcast television, CCC informed the city council that it planned to expand into other areas of the city. At approximately the same time, newly formed Boulder Communications Company informed the council of its interest in obtaining a permit to provide competing cable service in the city.[31]

The city council responded by enacting an emergency ordinance prohibiting CCC from expanding its business into other areas of the city for three months. The city planned during the moratorium to draft a model cable television ordinance and to invite new businesses to enter the Boulder market. The purpose of the moratorium was to prevent the expansion of CCC during the drafting of the model ordinance because it was feared that such expansion would discourage potential competitors from entering the market.[32] When the CCC continued building, city authorities arrested CCC's construction crews and tore down its cables.[33]

CCC filed suit in the United States District Court for the District of Colorado seeking a preliminary injunction and alleging that the city's restriction on CCC's expansion was a violation of section 1 of the Sherman Act.[34] The district court held that the state action exemption of *Parker v. Brown*[35] was not available to Boulder, and therefore the city was subject to antitrust liability.[36] The city appealed, and a divided panel of the Tenth Circuit Court of Appeals reversed, concluding that the city was immune from antitrust liability under *Parker*.[37]

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31. 50 U.S.L.W. at 4144-45.

32. *Id.* at 4145.

33. 630 F.2d at 710 (Markey, C.J., dissenting) (sitting by designation).

34. 15 U.S.C. § 1 (1976). This section states that "[e]very contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States . . . is declared to be illegal."

35. 317 U.S. 341 (1943).

36. Community Communications Co. v. City of Boulder, 485 F. Supp. 1035 (D. Colo. 1980).

37. 630 F.2d 704 (10th Cir. 1980). For a thorough discussion of the proceedings in the lower courts and a discussion of the state action exemption, see *Antitrust, Seventh Annual Tenth Circuit Survey*, 58 DEN. L.J. 249 (1981). *See also* Kennedy, *Of Lawyers, Lightbulbs and Raisins: An Analysis of the State Action Doctrine under the Antitrust Laws*, 74 NW. U. L. REV. 31 (1979).

During the pendency of this appeal, Boulder decided on a districting plan whereby more than one cable company will be operating in Boulder. The district court granted CCC another preliminary injunction against what had become for CCC a permanent geographic limitation. The district court granted the injunction on both Sherman Act and first amendment grounds. Community Communications Co. v. City of Boulder, 496 F. Supp. 823 (D. Colo. 1980). The court of appeals held that to the extent the lower court grounded its order on the Sherman Act, it erred because of the Tenth Circuit's earlier opinion. Community Communications Co. v. City of Boulder, No. 80-1882, slip op. at 9 (10th Cir. Sept. 22, 1981). The court of appeals reversed on the first amendment claim, holding that the district court erred in summarily applying the first amendment principles governing newspapers to cable operators. *Id.* at 15. The appellate court remanded to the district court for a determination of whether cable television's

The question facing the Supreme Court in Community Communications' appeal from the Tenth Circuit decision was whether Boulder was immune from liability under *Parker* and its progeny. In *Parker*, the Supreme Court was called upon to determine the validity of a program adopted by the State of California that sought to restrict competition in the state's raisin industry and prevented raisin producers from freely distributing their raisins through private channels.[38] The *Parker* Court held that the program was exempt from the antitrust laws, stating:

> We find nothing in the language of the Sherman Act or in its history which suggests that its purpose was to restrain a state or its officers or agents from activities directed by its legislature. In a dual system of government in which, under the Constitution, the states are sovereign, save only as Congress may constitutionally subtract from their authority, an unexpressed purpose to nullify a state's control over its officers and agents is not lightly to be attributed to Congress.[39]

For over three decades the Supreme Court did not elaborate on its view of state immunity from antitrust liability. Then, in 1975, in *Goldfarb v. Virginia State Bar*[40] the Court struck down a minimum fee schedule established by the Fairfax County Bar Association. The Court held that the threshold requirement for establishing antitrust immunity under *Parker* is that the activity must be required by the state in its sovereign capacity; immunity is permitted only if the action was in fact compelled, rather than merely authorized, by the state.[41] Because the State of Virginia did not require minimum fee schedules, the bar association enjoyed no immunity.

The following year, the Supreme Court was again faced with a state action question. In *Cantor v. Detroit Edison Co.*,[42] the Court held that a public utility's policy of dispensing free light bulbs to consumers of electricity was subject to the antitrust laws. The Court stated that, in the absence of a state policy regarding the regulation of the distribution of light bulbs, approval by the Michigan Public Service Commission of the tariffs containing the distribution was not a sufficient basis for immunity.[43]

In *Bates v. State Bar of Arizona*,[44] the Supreme Court for the first time since *Parker* granted a defendant immunity on state action grounds. At issue was a state disciplinary rule prohibiting advertising by lawyers. Because the rule was an "affirmative command of the Arizona Supreme Court,"[45] and because the Arizona Supreme Court was given authority to govern the legal profession by the state constitution, the court sustained the State Bar's claim of immunity.

"unique attributes" warrant, under the first amendment, the type of regulation the city seeks to impose. *Id.* at 24.

38. 317 U.S. at 344-48.
39. *Id.* at 350-51.
40. 421 U.S. 773 (1975).
41. *Id.* at 790.
42. 428 U.S. 579 (1976).
43. *Id.* at 598.
44. 433 U.S. 350 (1977).
45. *Id.* at 360.

In 1978, the Supreme Court addressed the applicability of the *Parker* doctrine to municipalities. In *City of Lafayette v. Louisiana Power & Light Co.*,[46] the Court rejected the proposition that cities were automatically entitled to the *Parker* exemption. The issue in the case was whether two Louisiana cities, which owned and operated electric utility systems, could be held liable under the Sherman Act for offenses allegedly committed in the conduct of their utility systems. A plurality applied a test for immunity based upon the authorization by the state of the challenged conduct. According to the plurality, municipal conduct is shielded from the antitrust laws if the conduct is engaged in "pursuant to state policy to displace competition with regulation or monopoly public service."[47] This state policy must be "clearly articulated and affirmatively expressed."[48] The plurality opinion stated:

> Cities are not themselves sovereign; they do not receive all the federal deference of the States that create them. Parker's limitation of the exemption to "official action directed by a state" is consistent with the fact that the States' subdivisions generally have not been treated as equivalents of the States themselves. In light of the serious economic dislocation which could result if cities were free to place their own parochial interests above the Nation's economic goals reflected in the antitrust laws, we are especially unwilling to presume that Congress intended to exclude anticompetitive municipal action from their reach.[49]

Chief Justice Burger concurred in the judgment on the basis that the antitrust laws should reach municipal action when the city is acting in a proprietary capacity, but not when it is acting in its governmental capacity. Because the City of Lafayette was engaged in the business of a public utility, the Chief Justice would not allow them an exemption.[50]

In *Community Communications*, the Court held that Boulder's moratorium could not be exempt from the antitrust laws unless it constituted either the action of the State of Colorado or municipal action in furtherance of "clearly articulated and affirmatively expressed state policy."[51] Boulder argued that these conditions were met because of its status as a home rule city.[52] Because home rule cities in Colorado have "*every power* theretofore possessed by the legislature . . . in local and municipal affairs,"[53] Boulder argued that its

46. 435 U.S. 389 (1978). *See generally* Kletzke, *Antitrust Liability of Municipal Corporations: The Per Se Rules vs. The Rule of Reason—A Reasonable Compromise*, 1980 ARIZ. ST. L.J. 253; Rogers, *Municipal Antitrust Liability in a Federalist System*, 1980 ARIZ. ST. L.J. 305; Rose, *Municipal Antitrust Liability*, 1980 ARIZ. ST. L.J. 245.

47. 435 U.S. at 413.

48. *Id.* at 410. A majority of the Court later adopted this test in California Retail Liquor Dealers Ass'n v. Midcal Aluminum, Inc. 445 U.S. 97, 105 (1980).

49. *Id.* at 412-13 (citations omitted).

50. *Id.* at 422.

51. 50 U.S.L.W. at 4146-47.

52. *Id.* at 4147. The Colorado Home Rule Amendment gives cities and towns having a population of two thousand inhabitants the power to enact ordinances relating to local matters which "supersede within territorial limits and other jurisdiction of said city or town any law of the state in conflict therewith." COLO. CONST. art. xx, § 6.

53. 50 U.S.L.W. at 4147 (quoting Denver Urban Renewal Authority v. Byrne, 618 P.2d 1374, 1381 (Colo. 1980), quoting Four-County Metropolitan Capital Improvement Dist. v. Board of County Comm'rs, 149 Colo. 284, 294, 369 P.2d 67, 72 (1962) (emphasis in original)).

ordinance was an act of government performed by the city acting as the state in local matters.[54] The Court rejected this argument, stating that the city misconceived both the letter and the spirit of the law. The Court stated that "[o]urs is a *'dual* system of government,' which has no place for sovereign cities,"[55] and quoted the dissent in the court of appeals as stating "[w]e are a nation not of 'city-states' but of States."[56]

> The Court couched its opinion in terms of legislative intent, stating that [w]hen *Parker* examined Congress' intentions in enacting the antitrust laws, the opinion noted that 'nothing in the language of the Sherman Act or in its history . . . suggests that its purpose was to restrain a state or its officers or agents from activities *directed by its legislature* . . . . [And] an unexpressed purpose to nullify a *state's control over its officers and agents* is not lightly to be attributed to Congress.' Thus *Parker* recognized Congress' intention to limit the state action exemption based upon the federalism principle of limited state sovereignty.[57]

The Court's argument is misleading in two respects. First, it suggests that Congress, when it passed the Sherman Act, intended to exempt state, but not municipal, action. Given the extremely narrow definition of "interstate commerce" at the turn of the century,[58] it is more likely that it never occurred to Congress that the Act might one day be applied to government action. Second, the majority opinion suggests that the *Parker* Court intended to exclude municipal action from the exemption it created. That message from the *Parker* opinion is not as clear as the majority implies. The *Parker* Court stated, in examining the legislative history of the Act, that "[t]he sponsor of the bill . . . declared that it prevented only 'business combinations.' "[59] The *Parker* Court continued, stating that the purpose of the Sherman Act "was to suppress combinations to restrain competition and attempts to monopolize by *individuals and corporations*,"[60] and "we have no question of the *state or its municipality* becoming a participant in a private agreement or combination by others for restraint of trade . . . ."[61] The *Parker* opinion simply does not support the conclusion that the *Parker* Court intended to limit the scope of the exclusion.

The City of Boulder also argued that the ordinance constituted action undertaken pursuant to a clearly articulated and affirmatively expressed state policy, contending that by virtue of the Colorado Home Rule Amend-

54. The Court assumed, without deciding, that the ordinance fell within the scope of the power delegated to the city by virtue of the Colorado Home Rule Amendment, that is, that the regulation of cable television is a local matter. 50 U.S.L.W. at 4147 n.16.

55. *Id.* (quoting *Parker v. Brown*, 317 U.S. at 351) (emphasis added by *Community Communications* Court).

56. 50 U.S.L.W. at 4147 (quoting *Community Communications Co. v. City of Boulder*, 630 F.2d at 717 (Markey, C.J., dissenting)).

57. 50 U.S.L.W. at 4147 (emphasis added by *Community Communications* Court) (citations omitted).

58. *See, e.g.*, United States v. E.C. Knight Co., 156 U.S. 1 (1896) (sugar trust not engaged in interstate commerce).

59. 317 U.S. at 351 (citing Cong. Rec. 2562, 2457).

60. 317 U.S. at 351 (emphasis added).

61. *Id.* at 351-52 (emphasis added).

ment's guarantee of local autonomy Colorado has granted to Boulder the power to enact the moratorium ordinance and that the legislature contemplated the kind of action complained of.[62] The Court held, however, that the requirement of "clear articulation and affirmative expression" is not satisfied by neutrality on the part of the state, stating that acceptance of the proposition that a general grant of power to enact ordinances constitutes state authorization to enact anticompetitive ordinances would "wholly eviscerate" the concepts of "clear articulation and affirmative expression" required by the Court's earlier precedents.[63]

The Court went on to say that the mere finding that the *Parker* exemption was not available to the city did not mean that the same antitrust rules that now apply to private persons would apply to cities. The Court stated that "[i]t may be that certain activities, which might appear anticompetitive when engaged in by private parties, take on a different complexion when adopted by a local government."[64]

In a vigorous dissent, Justice Rehnquist described the majority's decision as a "novel and egregious error"[65] and expressed concern that it would "impede, if not paralyze"[66] the efforts of local governments to protect the public health, safety, and welfare.

The dissent argued that the majority erred in characterizing the *Parker* decision as one involving *exemption* from the Sherman Act, arguing instead that it involved *preemption*. Because the presumptions utilized in exemption analysis are quite different from those used in preemption analysis, the dissent argued that failure to distinguish between the two led the Court to the wrong conclusion. According to Justice Rehnquist, preemption analysis involves "the interplay between the enactments of two different sovereigns—one federal and the other state."[67] Under the supremacy clause,[68] when there is a conflict between the laws of the federal government and those of a state or local government,[69] or where the federal government has occupied a field exclusively, the state or local enactment must fall. Because of federalism concerns, there is a presumption against preemption that can be overcome only by a clear manifestation by Congress of an intention that the federal act should supersede the police powers of the state.[70]

Justice Rehnquist argued that exemption, on the other hand, does not involve the interplay of enactments of different jurisdictions, but rather the interplay of enactments of a single sovereign. The question under exemption

62. 50 U.S.L.W. at 4147.
63. *Id.* at 4147-48.
64. *Id.* at 4148 n.20.
65. 50 U.S.L.W. at 4152 (Rehnquist, J., dissenting).
66. *Id.* at 4149.
67. *Id.* (quoting Handler, *Antitrust - 1978*, 78 COLUM. L. REV. 1363, 1379 (1978)).
68. U.S. CONST. art vi, cl. 2, states in pertinent part:
This Constitution, and the laws of the United States which shall be made in Pursuance thereof . . . shall be the supreme Law of the Land . . . .
69. The Supreme Court has never made a distinction between states and their subdivisions with regard to the preemptive effects of federal law. 50 U.S.L.W. at 4151 (Rehnquist, J., dissenting). *See* City of Burbank v. Lockheed Air Terminal, Inc., 411 U.S. 624 (1973); Huron Portland Cement Co. v. Detroit, 362 U.S. 440 (1960).
70. 50 U.S.L.W. at 4149 (Rehnquist, J., dissenting).

analysis is whether one law was intended to relieve a party from the necessity of complying with a prior enactment, and the presumption is that there was no such intent.[71]

The dissent predicted a number of problems to be encountered in the future due to the majority's application of the antitrust laws to municipalities. These problems include a determination of whether the *per se* rules of illegality[72] will apply to municipal defendants in the same manner as they are applied to private defendants, and whether cities will be liable for treble damages for enacting anticompetitive ordinances.[73] The major problem foreseen by the dissent, however, is the application of the "rule of reason" to municipalities. Under the rule of reason, as applied to private defendants, restraints may be defended only on the basis that the restraint has no unreasonable effect on competition or that its pro-competitive effects outweigh its anticompetitive effects.[74] For example, in *National Society of Professional Engineers v. United States*,[75] which dealt with a provision in the Society's ethical code prohibiting competitive bidding, the Court held that an anticompetitive restraint could not be defended on the basis of a private party's conclusion that competition is itself unreasonable. The *Community Communications* dissent questioned whether the same rule would apply to municipalities, that is, whether municipalities would be foreclosed from arguing that the benefits to the health, safety, and public welfare outweigh the anticompetitive effects of the ordinance. Justice Rehnquist stated that "[i]f municipalities are permitted only to enact ordinances that are consistent with the pro-competitive policies of the Sherman Act, a municipality's power to regulate the economy would be all but destroyed."[76]

On the other hand, he argued, if the rule of reason were modified to permit a municipality to defend its regulation on the ground that its benefits to the community outweigh its anticompetitive effects, the Court would be called upon to engage in the same wide-ranging, standardless inquiry into local regulation that it did during the *Lochner* era.[77]

If the problem were analyzed as one of preemption rather than one of exemption, argued the dissent, these problems would be avoided.[78] Instead of a sweeping review by federal courts, the courts would be confronted with the simpler question of whether the ordinance enacted is preempted by the Sherman Act. Moreover, because a municipality does not violate the antitrust laws when it enacts legislation preempted by the Sherman Act, deter-

71. *Id.*

72. Under the *per se* rules, some kinds of conduct are considered unreasonable as a matter of law, and there will be no inquiry into their reasonableness. United States v. Socony-Vacuum Oil Co., 310 U.S. 150 (1940) (price fixing).

73. Section 4 of the Clayton Act provides that "any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws . . . shall recover threefold the damages by him sustained." 15 U.S.C. § 15 (1976).

74. *See* Standard Oil Co. v. United States, 221 U.S. 1 (1911).

75. 435 U.S. 679 (1978).

76. 50 U.S.L.W. at 4151 (Rehnquist, J., dissenting).

77. During the "*Lochner* era," the Supreme Court invalidated a great amount of social and economic legislation on the ground that it violated the due process clause. *See, e.g.*, Lochner v. New York, 198 U.S. 45 (1905); Allgeyer v. Louisiana, 165 U.S. 578 (1897).

78. 50 U.S.L.W. at 4151 (Rehnquist, J., dissenting).

mining the remedy is not a problem—the preempted legislation is simply invalid and unenforceable.

Finally, the dissent warned that the majority's decision effectively destroys the "home rule movement," through which local governments have garnered some autonomy over matters of local concern.[79] The impact of this decision will be felt most by those municipalities having the greatest autonomy because they will be least able to avail themselves of the protective mantle of the state.

The impact of this case is far from certain, and the resolution of the problems forecasted by the dissent will not be simple. Perhaps a better resolution of the case would have been to adopt the preemption analysis of the dissent in *Community Communications* and Chief Justice Burger's concurrence in *City of Lafayette*, in which he argued for a distinction between proprietary and governmental functions.[80] Under this analysis, municipal activity is not subject to the antitrust laws if the activity is governmental and not preempted; municipal activity is subject to the antitrust laws if the municipality is engaging in proprietary activity or governmental activity that is preempted.

Local governments should not be hamstrung in their ability to protect the health, safety, and public welfare of their citizens; nor should they, when engaging in a proprietary activity, be permitted to avail themselves of an "exemption" from the antitrust laws, thereby putting themselves in a position superior to that of their private competitors. In the absence of a clear manifestation by Congress of an intent to preempt local government action, such action should not be subject to the antitrust laws.

Kingsley R. Browne

III. *MITCHELL V. D.R.*—VACATED AND REMANDED

In *Mitchell v. D.R.*,[81] the Supreme Court vacated and remanded for further consideration in light of *Harris v. McRae*[82] and *Williams v. Zbaraz*,[83] the Tenth Circuit Court of Appeals' decision in *D.R. v. Mitchell*.[84] The court had held that a Utah statute,[85] which prohibited the expenditure of public assistance funds for abortions except where the operation was necessary to

79. *Id.* at 4152.

80. Admittedly, this is not always a clear distinction. For example, in the Tenth Circuit's *Community Communications* decision, the majority felt that the regulation of cable television was an exercise of governmental authority, 630 F.2d at 707, while the dissent claimed that the ordinances are, "in fact and intent," contracts, reflecting a proprietary interest. 630 F.2d at 719 (Markey, C.J., dissenting). The city was not, however, engaging in the *operation* of a cable television business, in which case it would be involved in proprietary activity; instead, it was involved in the *regulation* of the cable television business, a governmental activity.

81. 449 U.S. 808 (1980).

82. 448 U.S. 297 (1980).

83. 448 U.S. 358 (1980).

84. 617 F.2d 203 (10th Cir. 1980).

85. Utah Code Ann. § 55-15a-3 (Supp. 1979).

preserve the mother's life, was unconstitutional. Three Supreme Court Justices[86] dissented and adopted the reasoning set forth in the dissenting opinions of *Harris* and *Williams*. On remand, the Tenth Circuit[87] affirmed the district court's decision,[88] concluding that the Utah statute restricting abortion funding did not deny the plaintiff equal protection and due process of law.

At the time the abortion was sought, the plaintiff, an unmarried mother of one, was a recipient of Aid to Families with Dependent Children (AFDC),[89] a program which entitled the plaintiff to receive medical care under the Medicaid Assistance Program.[90] Upon discovering her pregnancy, the plaintiff consulted with her doctor about securing an abortion and the doctor determined that an abortion was appropriate medical treatment.[91] Thereafter, plaintiff attempted but was denied admittance to the University of Utah Medical Center on the grounds that the Center would not be reimbursed for services rendered because of a recently enacted Utah statute.[92]

The Utah statute provision for abortion funding is similar to the funding criteria established by the Medicaid Assistance Program as amended by the "Hyde Amendment."[93] In addition to providing funding for abortions where a mother's life is endangered, the legislative policy of the Utah law indicates that funding should be given for cases of rape and incest.[94]

The plaintiff brought an action in federal district court seeking to establish that the Utah law is unconstitutional and that an abortion is medical treatment which the plaintiff was entitled to receive under the appropriate statutes and regulations.[95] The trial court disagreed, holding that the Utah statute does provide public assistance for abortions which are therapeutic, and that the standard for determining when an abortion is therapeutic is clearly articulated.[96] After reviewing recent Supreme Court decisions,[97] the trial court concluded that a state has the power to favor childbirth over abortions by the allocation of funds so long as the state's action does not directly interfere with a protected activity. Therefore, the statute, which does favor childbirth by limiting abortion funding to cases where a mother's

86. 449 U.S. 808 (Blackmun, Brennan & Marshall, JJ., dissenting).
87. *D. R. v. Mitchell*, 645 F.2d 852 (10th Cir. 1981).
88. 456 F. Supp. 609 (D. Utah 1978).
89. 42 U.S.C. § 601 (1976).
90. *Id.* § 1396.
91. 456 F. Supp. at 610.
92. Utah Code Ann. § 55-15a-3 (Supp. 1979).
93. The Hyde Amendment is an appropriation measure passed each year since 1977 under which Congress has restricted the use of federal funds to certain types of necessary abortions. Departments of Labor and Health, Education, and Welfare Appropriations Act, 1977, Pub. L. No. 95-205, § 101, 95 Stat. 1460.
94. This policy would authorize expenditures in cases where the Hyde Amendment, depending on the year in question, does not provide federal reimbursement. *See* 456 F. Supp. at 625 n.2.
95. 456 F. Supp. 609 (D. Utah 1978).
96. *Id.* at 623. In the court's opinion, therapeutic abortion means an abortion which is necessary to save a mother's life. *Id.*
97. *Maher v. Roe*, 432 U.S. 464 (1977); *Beal v. Doe*, 432 U.S. 438 (1977); *Poelker v. Doe*, 432 U.S. 519 (1977).

life is endangered but which does not prevent a woman from exercising her right to have an abortion, is valid.

On appeal, the Tenth Circuit reversed, holding that the trial court's interpretation of therapeutic was too narrow, since "therapeutic" can include abortions necessary to preserve a mother's health—even though her life may not be endangered.[98] The court noted that the Supreme Court cases relied upon by the trial court related to nontherapeutic abortions and did not address the issue of which abortions are actually included in the term therapeutic.

The Supreme Court, in a memorandum decision, vacated and remanded the court of appeals' decision in light of two recent opinions.[99] In *Harris v. McRae*[100] the Supreme Court held in part that provisions governing the Medicaid Assistance Program[101] do not require states to fund certain types of abortions for which federal reimbursement is unavailable. The Court further noted that restrictive federal funding for abortions does not impinge upon a woman's choice to terminate her pregnancy, and therefore does not violate the due process and equal protection clauses of the fifth amendment. Four Justices dissented,[102] concluding that the state's interest in protecting potential life does not justify excluding needy women from obtaining medical assistance for medically necessary abortions which may include instances other than where the mother's life is endangered. The restrictions place on abortion funding, therefore, are invalid.

A companion case to *Harris*, *Williams v. Zbaraz*,[103] addressed the issue of whether an Illinois statute prohibiting medical assistance for abortions, except for those abortions where the mother's life is endangered, violates the equal protection clause of the fourteenth amendment. The Supreme Court adopted the reasoning stated in *Harris* and held that a state does not have to provide public funding for medically necessary abortions when federal reimbursement is unavailable. The Court also found that the Illinois statute does not deny a plaintiff equal protection of the law, even though it provides medical assistance for medically necessary procedures generally but not for medically necessary abortions. Four Justices dissented,[104] and adopted the dissenting opinion of *Harris*.

On remand, the Tenth Circuit Court of Appeals affirmed the trial court's decision wherein the court had held that the Utah statute did not deny the plaintiff due process and equal protection of the law.[105] The plaintiff on the second appeal, however, contended that the statute violated the supremacy clause because Utah's eligibility requirements are stricter than those under the federal statute. The court of appeals dismissed the claim, finding that the class for which the plaintiff argued had never been properly

98. 617 F.2d 203 (10th Cir. 1980).
99. *Mitchell v. D. R.*, 101 S. Ct. 53 (1980).
100. 448 U.S. 297 (1980).
101. 42 U.S.C. § 1396 (1976).
102. 448 U.S. 297, 329, 349 (Blackmun, Brennan, Marshall, and Stevens, JJ., dissenting).
103. 448 U.S. 358 (1980).
104. *Id.* at 370 (Blackmun, Brennan, Marshall, and Stevens, JJ., dissenting).
105. 645 F.2d at 853.

certified by the trial court. The appeal, therefore, was dismissed.[106]

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IV. *MERRION V. JICARILLA APACHE TRIBE*—AFFIRMED

In *Merrion v. Jicarilla Apache Tribe*,[107] the United States Supreme Court affirmed a 1980 Tenth Circuit decision wherein the court of appeals recognized the right of Indian tribes to impose a mineral severance tax on non-Indians producing oil and gas under leases on executive-order reservation lands.[108] The Court, in its lengthy opinion, generally adopted the reasoning of the court of appeals. The economic repurcussions of this significant decision will be felt throughout the western United States.

The Jicarilla Apache tribe resides on an executive-order Indian reservation in northwestern New Mexico.[109] Pursuant to the tribe's constitution,[110] which provides that the tribal council may enact ordinances to govern the development of tribal lands and natural resources, the tribal council adopted an ordinance imposing a severance tax on oil and gas production from tribal lands.[111] The Secretary of the Interior approved this ordinance in 1976.[112]

Petitioners, operating under federal leases granted prior to enactment of the ordinance, produced oil and gas from wells located on the Jicarilla Apache tribe's reservation. In federal district court, these lessees sued the tribe and the Secretary of the Interior seeking a declaratory judgment and an injunction that would prohibit enforcement of the severance tax. After making findings of fact, the trial judge held that: 1) neither tribal sovereignty nor federal legislation empowered the Jicarilla Apaches to enact the tax; 2) Congress granted to the State of New Mexico the exclusive right to

106. *Id.* at 854.

107. 50 U.S.L.W. 4169 (1982). Justice Marshall delivered the opinion of the Court. Justice Stevens, with whom the Chief Justice and Justice Rehnquist joined, filed a dissenting opinion.

108. Merrion v. Jicarilla Apache Tribe, 617 F.2d 537 (10th Cir. 1980) (en banc). Judge Logan delivered the opinion of the court of appeals, 617 F.2d at 539, with Judge McKay specially concurring, 617 F.2d at 549. Chief Judge Seth filed a dissenting opinion, 617 F.2d at 551, as did Judge Barrett, 617 F.2d at 556. For a thoughtful analysis of the Tenth Circuit's opinion, see *Lands and Natural Resources, Seventh Annual Tenth Circuit Survey*, 58 DEN. L.J. 415, 416-22 (1981).

109. The Jicarilla Apache reservation was established in 1887 by the executive order of President Cleveland. The Court noted that the fact that the reservation was established by executive order rather than by treaty or statute should not affect the analysis because an Indian tribe's sovereign power is not affected by the manner in which its reservation was created. 50 U.S.L.W. at 4170 n.1.

110. The Jicarilla Apache tribe is organized under the Indian Reorganization Act of 1934, ch. 576, § 16, 48 Stat. 987, 25 U.S.C. § 476 (1976), which authorizes any tribe residing on the same reservation to organize for its common welfare and to adopt a constitution and bylaws, subject to the approval of the Secretary of the Interior. The tribe's first constitution was approved by the Secretary in 1937, and a revised constitution was approved in 1968.

111. The tax is imposed on lessees of mineral leases on the reservation at the time of severance. The tax rate, assessed at the wellhead per barrel of crude oil and per million Btu of natural gas sold or transported off of the reservation, is payable monthly. Oil and gas received by the tribe as in-kind royalty payments from lessees are exempted from the tax. 617 F.2d at 539.

112. *Id.*

impose severance taxes on minerals extracted from executive-order reservations; and 3) the tax discriminated against and constituted a multiple burden on interstate commerce in violation of the commerce clause.[113]

The Tenth Circuit Court of Appeals, sitting en banc, reversed the decision of the lower federal court.[114] Writing for the majority, Judge Logan determined that the tribe has "the inherent power to levy a privilege tax on the occupation of severing oil and gas from reservation land even though the tax falls on nonmembers."[115] In a scholarly review of the law, Judge Logan discussed the limitations imposed upon Indian tribal sovereignty by the federal government.[116] The court of appeals resolved that Indian tribes may act only when such action does not impinge upon the superior rights and interests of the United States. Finding that the Jicarilla Apache's mineral severance tax did *not* interfere with any federal right,[117] the court of appeals concluded that the taxing power was one of those inherent attributes of sovereignty retained by the Indian tribe.[118]

In finding that taxation is an inherent power retained by the Indians, the Tenth Circuit was persuaded by Supreme Court decisions holding that the tribe's retained powers have at least some elements of territoriality.[119]

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113. *Id.* at 540.

114. Merrion v. Jicarilla Apache Tribe, 617 F.2d 537 (10th Cir. 1980) (en banc). See note 108 *supra*.

115. 617 F.2d at 544. The Tenth Circuit was in accord with the trial court's finding that no treaty or act of Congress specifically authorizes the Jicarilla Apache's imposition of the severance tax. *Id.* at 541.

116. *Id.* The Court recognized that although Indian tribes were once self-governing political nations, they no longer possess the full attributes of sovereignty. Oliphant v. Suquamish Indian Tribe, 435 U.S. 191 (1978); The Cherokee Nation v. Georgia, 30 U.S. (5 Pet.) 1 (1831). As a consequence, certain powers are denied to the tribes because exercise of these powers would infringe upon the superior rights of the federal government. *See, e.g.*, Johnson and Graham's Lessee v.M'Intosh, 21 U.S. (8 Wheat.) 543 (1823) (Indian tribes, though rightful occupants of the soil, may not convey it at their will, superior title having vested in the United States); The Cherokee Nation v. Georgia, 30 U.S. (5 Pet.) 1, 17-18 (1831) (Indian tribes may not deal with foreign nations because of the interest of the United States in protecting its external boundaries); Oliphant v. Suquamish Indian Tribe, 435 U.S. 191 (1978) (Indian tribes have surrendered the power to exercise criminal jurisdiction over non-Indians because of the overriding interest of the United States in protecting its citizens from unwarranted intrusions on their personal liberty).

117. 617 F.2d at 541-52. The court of appeals determined that the federal taxing power was in no way impinged by the Indian's tax, reasoning that the federal government can tax non-Indians or Indians within the reservation regardless of whether the tribe levies the severance tax. *Id.* Neither did the tax violate the protections afforded by the fifth and fourteenth amendments, because, in the court's opinion, the tax was not so severe as to constitute a deprivation of property. *Id.* at 542.

118. The Tenth Circuit recognized that the Indian tribes possess certain inherent powers of self-government. Significantly, the court of appeals found that the Indian tribes' powers are retained, *i.e.*, they are derived from the tribes' original status as independent sovereign nations. *E.g.*, United States v. Wheeler, 435 U.S. 313, 322-23 (1978). The majority of the court of appeals rejected the contention that the Jicarilla Apache tribe's authority to act was dependent upon affirmative enabling legislation by Congress. 617 F.2d at 542. Such a conclusion is consistent with the Supreme Court's determination that Indian tribes are much more than private, voluntary associations. *See* United States v. Mazurie, 419 U.S. 544, 557 (1975). *But see* 617 F.2d at 553-54 (Seth, C.J., dissenting) (arguing that the Jicarilla Apache tribe's property rights were little different from those of any other socio-religious group).

119. *See* Williams v. Lee, 358 U.S. 217 (1959) (state court without jurisdiction to hear action brought by nonmember against an Indian concerning contract formed on the reservation); Johnson and Graham's Lessee v. M'Intosh, 21 U.S. (8 Wheat.) 543 (1823) (voluntary transac-

The court of appeals reasoned that such territoriality permits the tribes to levy a tax that falls upon nonmembers doing business on the reservation, particularly when the nonmembers are extracting and removing mineral resources from Indian territory.[120] Moreover, the court of appeals found implicit congressional approval of this territoriality concept in regard to taxation. Judge Logan noted that Congress was aware of an Eighth Circuit decision upholding the right of Indian tribes to impose taxes upon non-Indians doing business within Indian reservations[121] when it set forth the sovereign powers of the tribes in section 16 of the Indian Reorganization Act of 1934. With such knowledge, Congress made no effort to limit the Indians' exercise of their taxing power.[122] Further support for the court of appeals' interpretation was found in an opinion of the Solicitor of the Department of the Interior, issued shortly after passage of the 1934 Act, wherein the Solicitor concluded that "chief among the powers of sovereignty recognized as pertaining to an Indian tribe is the power of taxation."[123] The court of appeals reasoned that this contemporaneous interpretation of the meaning of section 16 of the 1934 Act, by the agency charged with its enforcement, should be given great weight.[124]

In considering whether the severance tax violates the commerce clause, the court of appeals determined that although the commerce clause does not preclude the Indian tribes' power to tax, this constitutional provision limits the taxation authority of the tribes as well as the states.[125] The court further held that the standard to be used in applying the commerce clause to Indian action is "whether a tribe's tax legislation infringes upon the national interest in maintaining the free flow of interstate trade."[126] Rejecting the conclusions of the trial court, Judge Logan found that the severance tax did not discriminate against interstate commerce[127] nor did it impose a multiple

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tions between nonmembers and members of tribe within the confines of the reservation subject nonmembers to the laws of the tribe). *But see* Oliphant v. Suquamish Indian Tribe, 435 U.S. 191 (1978) (Indian tribes cannot exercise criminal jurisdiction over nonmembers who commit criminal acts on reservation land).

120. Chief Judge Seth based his dissent upon the particular history of the Jicarilla Apache tribe and its nomadic nature. 617 F.2d at 551. Judge Seth stated that the Jicarilla Apaches never exercised territoriality over a specific geographic area and noted that the location in New Mexico to be occupied by the Jicarilla Apaches changed several times through the promulgation and revocation of executive orders. *Id.* at 553. The Chief Judge therefore concluded that the Jicarilla Apaches never exercised the territoriality necessary to justify imposition of a severance tax. *Id.*

121. Buster v. Wright, 135 F. 947 (8th Cir. 1905), *appeal dismissed*, 203 U.S. 599 (1906). *Accord*, Morris v. Hitchcock, 194 U.S. 384 (1904); Barta v. Oglala Sioux Tribe, 259 F.2d 553 (8th Cir. 1958), *cert. denied*, 358 U.S. 932 (1959).

122. 617 F.2d at 544.

123. 55 Interior Dec. 14, 46 (1934).

124. 617 F.2d at 544.

125. *Id.*

126. *Id.* at 545.

127. *Id.* The court found no discrimination in the ordinance's exemption for oil and gas taken by the tribe as in-kind royalty payments. Judge Logan concluded that subjecting royalty products received by the tribe to its own tax would be "a fruitless and wasteful act." *Id.* In addition, the court perceived no *per se* discrimination against interstate commerce. The court stated that "it is settled that an occupation or privilege tax on the mining or severing of natural resources, although closely connected with interstate commerce, is a local activity properly subject to local taxation . . . even though the severed product is destined for immediate entry into

burden on such commerce.[128]

The Tenth Circuit also rejected the district court's determination that Congress preempted the exercise of the tribe's power to levy a severance tax by specifically authorizing the states to impose severance taxes on oil and gas production from executive-order reservations.[129] The court of appeals applied the canon that statutes passed for the benefit of the Indian tribes should be construed liberally, so that all ambiguities are resolved in favor of the Indians.[130] Judge Logan found that neither the language nor the legislative history of the act granting taxing authority to the states evidenced a congressional intent to preempt tribal taxation.[131] The court also emphasized that despite the comprehensive federal regulation of mineral leasing on Indian lands, Congress expressly has provided that tribes like the Jicarilla Apaches may, by proper constitutional and legislative means approved by the Secretary of the Interior, set terms and conditions for operations of mineral leases.[132]

The Supreme Court granted certiorari to determine whether the Jicarilla Apache tribe has the authority to impose a severance tax on oil and gas produced from the tribe's reservation lands, and, if so, whether the tax imposed by the tribe violates the commerce clause.[133] Affirming the decision of the Tenth Circuit, the Court held that the tribe has the inherent power to impose the severance tax as a necessary attribute of its powers of self-government.[134] The Supreme Court also ruled that the severance tax did not impose a burden on interstate commerce.[135]

The Court began its reasoning with the assertion that "the power to tax

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interstate commerce . . . and even though the cost of interstate commerce is increased." *Id.* at 545-46 (citations omitted).

128. *Id.* at 546. The court of appeals rejected the lessee's argument that because New Mexico also imposes an oil and gas severance tax, the Jicarilla Apache tribe's tax constitutes a multiple burden on interstate commerce. Judge Logan held that New Mexico's ability to impose an identical tax on lessees "does not implicate the federal interest in maintaining the flow of interstate commerce at all." *Id.* Rather, the court of appeals raised without deciding the possibility that, absent the express congressional authorization to the states to tax minerals extracted from executive-order Indian reservations, New Mexico's tax might interfere with the federal interest in regulating Indian affairs. *Id.* Such dicta may be unsettling to those states imposing severance taxes on minerals removed from Indian reservations created by statute or treaty because there is no federal legislation expressly authorizing state taxation of minerals extracted from such Indian lands. *See* Comment, *The Case for Exclusive Tribal Power to Tax Mineral Lessees of Indian Lands*, 124 U. PA. L. R. 491, 507 (1975), wherein the author discusses the proposition that state taxation of Indian reservation mineral lessees is invalid. *But see* Oklahoma Tax Comm'n v. Texas Co., 336 U.S. 342 (1949), wherein the Court held that states may tax lessees' income derived from mineral production activities on reservation leaseholds, even though the taxation might interfere with royalty payments due to the tribe.

129. 617 F.2d at 547-49. 25 U.S.C. § 398c (1976) authorizes the states to impose taxes upon the mineral output of lessees upon land in executive-order Indian reservations. There is no similar statutory authorization for state taxation of lessees severing minerals from Indian reservations created by treaty or statute.

130. Bryan v. Itasca County, 426 U.S. 373, 392 (1976).

131. 617 F.2d at 547. Based upon a study of the legislative history, the court stated that Congress did not consider the issue of Indian tribal taxation during the passage of the legislation authorizing state taxation.

132. 25 U.S.C. § 396b (1976).

133. 449 U.S. 820 (1980).

134. 50 U.S.L.W. 4169 (1982).

135. *Id.* at 4175-76.

is an essential attribute of Indian sovereignty because it is a necessary instrument of self-government and territorial management."[136] Justice Marshall, speaking for the Court, emphasized that the power to tax is not derived solely from the Indian tribes' power to exclude non-Indians from tribal lands.[137] Agreeing with Judge McKay's observation that the tax is necessary to enable the tribe to carry out the municipal functions approved and mandated by Congress,[138] the Court found that lessees who avail themselves of the governmental services provided by the Indians ought to be required to contribute through the payment of taxes to the general cost of such services.[139]

Justice Marshall next asserted that even if the tribe's power to tax was derived solely from its power to exclude non-Indians from the reservation, the severance tax would be valid.[140] The Court's rationale for this conclusion was that because the Indians have the power to exclude non-Indians from reservation lands, they have the lesser power to tax or place other conditions on the non-Indians' conduct or continued presence on the reservation. Furthermore, the Court found that a non-Indian who enters tribal jurisdiction remains subject to the risk that the tribe will later exercise its sovereign power.[141]

As to the question of whether federal legislation preempts imposition of the severance tax by the Indians, the Supreme Court was in accord with the Tenth Circuit's finding that neither federal regulation of leasing on Indian lands nor the congressional authorization to the states to impose taxes on oil and gas produced from executive-order reservations deprives the tribe of its authority to impose the severance tax.[142] Beyond its adoption of the Tenth Circuit's rationale,[143] the Supreme Court pointed to the fact that Congress has recognized Indian-imposed taxes as one of the costs that may be recovered under federal energy pricing regulations in support of its conclusion that imposition of the severance tax would not contravene federal policy or law.[144]

Although the Court concurred with the Tenth Circuit's conclusion that there was no commerce clause problem with the Jicarilla Apache tribe's severance tax, Justice Marshall used a different analysis. The Court noted that state or Indian taxes may violate the "negative implications" of the com-

136. *Id.* at 4171.

137. *Id.*

138. 617 F.2d at 550 (McKay, J., concurring).

139. 50 U.S.L.W. at 4171.

140. *Id.* at 4173.

141. *Id.* The Court concluded, therefore, that the fact that the tribe chose not to exercise its power to tax when it first granted the petitioners' leases did not divest the tribe of its authority to impose a tax on the severed minerals.

142. *Id.* at 4174.

143. *Id.* The Court emphasized that the Secretary of the Interior had approved both the tribe's constitution, which authorized tribal council regulation of natural resources, and the severance tax ordinance itself. In the Court's view, this demonstrated federal accord with the tribe's actions. In addition, the Court approved the Tenth Circuit's reasoning that the act permitting state taxation of mineral leases on executive-order reservations did not divest the tribe of its taxing power.

144. *Id.* at 4175.

merce clause by unduly burdening or discriminating against interstate commerce and that judicial review is intended to ensure that such taxes do not disrupt or burden commerce "when Congress' power remains unexercised."[145] Once Congress acts, however, courts are not free to review state or Indian regulations. Justice Marshall stated that when Congress has struck the balance it deems appropriate, the courts are no longer needed to prevent a burdening of commerce, and "it matters not that the courts would invalidate the state tax or regulation . . . in the absence of congressional action."[146] The Court concluded that Congress has acted affirmatively by providing a series of federal checkpoints that must be cleared before a tribal tax can take effect and, in this case, the severance tax was enacted in accordance with this congressional scheme.[147] The Court adjudged that it was improper "to strike down a tax that has traveled through the precise channels established by Congress, and has obtained the specific approval of the Secretary [of the Interior]."[148]

145. *Id.*
146. *Id.*
147. *Id.* at 4176.
148. *Id.* The Court noted that if judicial scrutiny had been warranted in this case, the severance tax would survive such scrutiny. *Id.*

V. DENIALS OF CERTIORARI

Cases from Seventh Annual Survey	Tenth Circuit Citation	Certiorari Denied
Amarex, Inc. v. FERC	603 F.2d 127 (1979)	444 U.S. 1102 (1980)
Bowe v. First of Denver Mortgage Investors	613 F.2d 798 (1980)	447 U.S. 906 (1980)
Brice v. Day	604 F.2d 664 (1979)	444 U.S. 1086 (1980)
Colorado v. Veterans Administration	602 F.2d 926 (1979)	444 U.S. 1014 (1980)
Doiese v. United States	605 F.2d 1146 (1979)	445 U.S. 961 (1980)
Dyer v. Crisp	613 F.2d 275 (1980)	445 U.S. 945 (1980)
EEOC v. Fruehauf Co.	609 F.2d 434 (1979)	446 U.S. 965 (1980)
EEOC v. Safeway Stores, Inc.	611 F.2d 795 (1979)	446 U.S. 952 (1980)
Estate of Shelton v. Commissioner	612 F.2d 1276 (1980)	449 U.S. 873 (1980)
Hackney v. Newman Memorial Hospital, Inc.	621 F.2d 1069 (1980)	449 U.S. 982 (1980)
Hiatt Grain & Feed, Inc. v. Bergland	602 F.2d 929 (1979)	444 U.S. 1073 (1980)
Hunt v. Nuclear Regulatory Commission	611 F.2d 332 (1979)	445 U.S. 906 (1980)
Jicarilla Apache Tribe v. United States	601 F.2d 1116 (1979)	444 U.S. 995 (1979)
Kansas v. Adams	608 F.2d 861 (1979)	445 U.S. 963 (1980)
Kirkpatrick v. United States	605 F.2d 1160 (1979)	444 U.S. 1075 (1980)
Lemons v. City and County of Denver	620 F.2d 228 (1980)	449 U.S. 888 (1980)
Livingston v. Ewing	601 F.2d 1110 (1979)	444 U.S. 870 (1979)
Naisbitt v. United States	611 F.2d 1350 (1980)	449 U.S. 855 (1980)
Newspaper Printing Corp. v. NLRB	625 F.2d 956 (1980)	450 U.S. 911 (1981)
Nolan v. DeBaca	603 F.2d 810 (1979)	446 U.S. 956 (1980)
Plastic Container Corp. v. Continental Plastics of Oklahoma, Inc.	607 F.2d 885 (1979)	444 U.S. 1018 (1980)
Reid Burton Construction, Inc. v. Carpenters District Council	614 F.2d 698 (1980)	449 U.S. 824 (1980)
Richins v. Southern Pacific Co.	620 F.2d 761 (1980)	449 U.S. 1110 (1981)
Rutherford v. United States	616 F.2d 455 (1980)	449 U.S. 937 (1980)
Sanders v. Oliver	611 F.2d 804 (1979)	449 U.S. 827 (1980)
Texas Oil & Gas Corp. v. Michigan Wisconsin Pipe Line Co.	601 F.2d 1144 (1979)	444 U.S. 991 (1979)
United States v. Andrews	618 F.2d 646 (1980)	449 U.S. 824 (1980)
United States v. Carra	604 F.2d 1271 (1979)	444 U.S. 994 (1979)
United States v. Chapman	615 F.2d 1294 (1980)	446 U.S. 967 (1980)
United States v. Fahey	614 F.2d 690 (1980)	101 S. Ct. 81 (1980)
United States v. Income Realty & Mortgage, Inc.	612 F.2d 1224 (1979)	446 U.S. 952 (1980)
United States v. Kralik	611 F.2d 343 (1979)	445 U.S. 953 (1980)
United States v. Sparrow	614 F.2d 229 (1980)	450 U.S. 1004 (1981)
Volz v. Department of Justice	619 F.2d 49 (1980)	449 U.S. 982 (1980)
Whiskers v. United States	600 F.2d 1332 (1979)	444 U.S. 1078 (1980)
Yanez v. Romero	619 F.2d 851 (1980)	449 U.S. 876 (1980)